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IN THE

Supreme Court of the United States

October Term, 1952

No. 517.

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEONA JACKSON,
Respondent.

RESPONDENT'S BRIEF ON CERTIORARI.

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Question Presented.

Although the issue is somewhat obscured by Petitioner's arguments on collateral matters the question presented here is whether or not judicial cognizance of a damage action against the signer of a race restrictive covenant, whose sale of race restricted real property eventuates in its occupancy by a Negro, is permissible state action.

Statement of the Case.

Respondent owner of a lot signed a race restrictive covenant in 1944 proscribing Negro occupancy. On February 2, 1950, she conveyed the lot to predecessors in title of Negro occupants. On September 3, 1950, she vacated the premises and the next day Negroes began occupancy. It is alleged that she vacated in order to "permit persons known to her to be other than the Caucasian

race" to move into the premises. She failed to include the proscriptive clause in her deed of February 2, 1950, as she had covenanted to do.[1] Because California has long held that covenants against the sale of land to persons of particular racial groups contravene its statutory and public policy against restraints on alienation,[2] Petitioners predicated their suit on the theory that the occurrence of non-conforming occupancy, *per se*, gave rise to a cause of action for damages against Respondent and in favor of Petitioners who were signers of the agreement.

Basing its decision on *Shelley v. Kramer*, 334 U. S. 1, the trial court sustained a demurrer without leave to amend as against all Petitioners and ordered judgment for Respondent. Also relying on *Shelley*, the California District Court of Appeal affirmed the judgment of the trial court. The California Supreme Court denied a petition to hear the case after decision by the District Court of Appeal.[3]

Petitioners are here on petition for certiorari.

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[1]The covenant was recorded and in California recordation of such an instrument imparts notice of its terms to subsequent purchasers. (California Civ. Code, Sec. 1213; *Wayt v. Patee*, 205 Cal. 46.) (Recitals in the deed are superfluous.)

[2]Covenants against sales have been held void. This rule was established in *Los Angeles Investment Co. v. Gary* (1919), 181 Cal. 680, and was followed without variance until the decision in *Shelley v. Kramer*, 334 U. S. 1, with California courts upholding covenants against use and occupancy and refusing enforcement of agreements against sale.

[3]Under California procedure the refusal of its Supreme Court to hear a cause after decision by its District Court of Appeal indicates approval of the result reached but does not necessarily indicate concurrence in the grounds of the decision. (*People v. Davis*, 147 Cal. 346; *Burke v. Maze*, 10 Cal. App. 206.)

Argument.

Petitioners' assignment of errors is bottomed on the proposition that *Shelley* held that race restrictive covenants are "valid,"[4] and, they argue, that since such agreements are "valid" the State *must* afford a remedy in damages where non-Caucasian occupancy ensues as a result of a signer's sale of a restricted parcel. This unsophisticated concept slurs over the basic issue of whether State participation in the discriminatory scheme of the covenantors is forbidden by the command of the Fourteenth Amendment.

Plainly enough, Petitioners attempted to invoke state participation when they filed suit asking the state courts to assess and levy damages against Respondent. Judicial action is, of course, State action.

Virginia v. Rives, 100 U. S. 339, 347;
Shelley v. Kramer, 334 U. S. 1.

The precise impact of the Fourteenth Amendment lay in the fact that it "makes void 'State action of every kind' which is inconsistent with the guarantees therein contained and extends to manifestation of 'State authority in the shape of laws, customs, judicial or executive procedings.'"

Shelley v. Kramer, supra.

As this Court pointed out in *Shelley,* the landmark *Civil Rights Cases,* 109 U. S. 3, establish the proposition

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[4]This Court did not hold such agreements "valid" in those words. It did hold that "restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . . by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms . . . there has been no action by the States." (*Shelley v. Kramer, supra.*)

that any and every kind of State action taken to assist the individual in a racially discriminatory plan or scheme runs afoul of the Amendment.[5]

We do not understand Petitioners to contend that a State statute, city ordinance, or other enactment of a State or one of its subdivisions assessing damages against the signer of a race restrictive covenant, whose sale of such property eventuates in Negro occupancy, would escape constitutional condemnation. However Petitioners do contend that because the remedy they seek derives from a substantive rule of law fashioned from the complex of code provisions and decided cases their action is immune to constitutional attack. But:

> "It has been recognized that the action of state courts in enforcing substantive common law rules formulated by those courts may result in denial of rights guaranteed by the Fourteenth Amendment."
>
> *Shelley v. Kramer, supra,* p. 17.

A substantive rule of law, then, is no less, and no more, subject to constitutional scrutiny than legislative enactments or executive action.

Cf.:

American Federation of Labor v. Swing, 312 U. S. 321;

Shelley v. Kramer, supra.

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[5]This Court noted that the *Civil Rights Cases* contained no less than eighteen phrases condemnatory of state participation—either legislaive, executive, or judicial—in discriminatory action. It must be kept in mind that the *Civil Rights Cases* do *not* hold that the Amendment confers on the individual any right to discriminate. They simply hold that so long as the individual engages in discriminatory conduct *without* the aid of the state his conduct is not wrongful under the Amendment. The state may prohibit such conduct; it may not assist it.

The fact that participation of State courts is sought to enforce the terms of a private agreement does not aid Petitioners.

> "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of State power in all forms."
>
> *Shelley v. Kramer, supra.*

The California courts found as a fact that the purpose of the covenant drawn in issue here was discriminatory. The District Court of Appeal thus epitomizes this aspect of the matter:

> "Racial discrimination is inherent in the covenant; its purpose and impact is to prevent the use or occupancy of real property by non-Caucasians, to segregate non-Caucasions 'simply that and nothing more.' The basic pattern of racial discrimination is much the same in an action for damages as it is in a suit in equity." [R. p. 53.]
>
> *Barrows v. Jackson,* 112 A. C. A. 613.

The question of whether or not the State may lend its aid to residential segregation is not new to this Court. That issue was decided thirty-five years ago in *Buchanan v. Warley,* 245 U. S. 60.

The City of Louisville enacted an ordinance prescribing racial residential segregation. Buchanan, a white man agreed to sell a parcel of the interdicted property to Warley, a Negro. Warley breached his agreement and, when sued, pleaded the ordinance by way of justification for his

breach. He prevailed in the State courts. On writ of error to this Court, Buchanan attacked the constitutionality of the ordinance insofar as it denied his right to sell to a Negro. There, as is the case with Petitioners here, the objection:

> "is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons and plaintiff in error is a white person."
>
> *Buchanan v. Warley, supra,* p. 72.

This Court looked through *form* and saw that the *effect* of sustaining Warley's defense would be to prevent the use and occupancy of real property by Negroes—the same end envisaged here as epitomized by the District Court of Appeal. There the command of the ordinance was absolute prohibition; here the attempt is made to prevent Negro occupancy by the imposition of penalties in the guise of damages on those whose sales result in Negro occupancy.

In *Buchanan* this Court observed that:

> "The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color."
>
> *Buchanan v. Warley, supra,* p. 81.

What Petitioners seek here is application of a substantive rule of law which, through imposition of damages, will annul the civil right of a white person to dispose of her property in such a manner that Negro occupancy may ensue. Conceivably, fear of imposition of damages might

effectively prevent all sales where Negro occupancy might ensue—the very end sought by Petitioners here, and in *Buchanan*. Nor can it be doubted

> ". . . . that among the civil rights intended to be protected from discriminatory State action by the Fourteenth Amendment are the rights to acquire, enjoy, own and *dispose* of property." (Italics ours.)
>
> *Shelley v. Kramer, supra,* p. 10.

The short of the matter is that the State may not, through judicial, executive or legislative action, annul the civil right of any person to dispose of his property as he sees fit, and that is true whether the attempted annulment is by way of outright prohibition or through the imposition of penalties in the guise of damages.

At this posture of the case Petitioners interject the contention that Respondent is bound by her "contract" and that she "waived" her civil right to dispose of her property as she saw fit. Lawyers seeking to enforce agreements are fond of terming all writings to which their clients are parties "contracts" because the very term "contract" implies an agreement enforceable in a court of law.[6]

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[6] "A contract is a promise or set of promises for breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty." (Restatement of the Law of Contracts, Sec. 1.) Weighed in these scales, and equated with the holding in *Shelley* it cannot be said that race restrictive agreements are "contracts" in the ordinary sense of the term. Of course, not every agreement is a "contract" in that sense. English courts withheld enforcement of agreements in restraint of trade, for example, although the agreements were "valid." Agreements not conforming to the Statute of Frauds are "valid" as are agreements against which the Statute of Limitations has run. Laches may bar enforcement of a valid agreement.

The need for this semantic exercise is greater in this case than in the ordinary action because here Petitioners hope, by use of the term, to encase their claim for damages in armor that will render it impervious to constitutional attack. What eludes Petitioners here is the legal consequences that flow from the signing of restrictive agreements, racial or building, under California law. California has long and consistently held that such agreements create ". . . equitable easements or servitudes for the benefit of the lots of co-owners."

Young v. Cramer, 38 Cal. App. 2d 64, 69.

This doctrine of equitable servitudes has been affirmed and reaffirmed in a long line of cases, involving both building and racial restrictions.

Werner v. Graham, 181 Cal. 874;
Martin v. Holm, 197 Cal. 733;
Vesper v. Forest Lawn, 20 Cal. App. 2d 157;
Wing v. Forest Lawn, 15 Cal. 2d 472;
Wayt v. Patee, 205 Cal. 46.

Once the servitude was created the California courts, applying substantive rules of law, charged the conscience of the violator with observance of the servitude and either enjoined further violation or held him answerable in damages. Either remedy was available at the option of the complainant.

After *Shelley* the California courts declined to lend further aid in enforcement of race restrictive covenants, holding correctly that the full impact of this Court's de-

cision fell on the substantive rule of law under which they had previously charged the conscience of the violator with observance of the terms of the agreement. (*Cummings v. Hokr*, 31 Cal. 2d 844.) In this case the variant is that aid of the California courts was sought through a levy of damages rather than through injunctive relief. Again they declined, correctly, to apply the substantive rule of law to effectuate the discriminatory purpose of the covenantors. The District Court of Appeal phrased its declination in these words:

> "The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of the use or occupancy of the property by non-Caucasians—it is no longer a matter of individual action: it is one of State participation in the maintenance of racial residential segregation." [R. p. 53.]
>
> *Barrows v. Jackson, supra.*

Petitioners are as free in California as they ever were to enter into race restrictive agreements and to voluntarily adhere to them. There is nothing in the decision of which Petitioners complain that narrows that right in any particular. The fact that they are free to observe the terms of their agreement does not entitle them to demand State action to accomplish their discriminatory purposes. Parties cannot, by stipulation or agreement, confer on any court jurisdiction to exceed its constitutional powers.

Conclusion.

It is true as Petitioners set forth that there is an even division of the highest courts of the various states on the question involved here. California and Michigan have ruled adversely to Petitioners' claim; Oklahoma and Missouri have upheld the right of their courts to entertain damage actions of this kind. A trial court in the District of Columbia dismissed such an action on the authority of *Shelley*. Respondent agrees that the issue needs clarification but because the question presented has been so completely disposed of by prior decisions we respectfully urge that this Court grant certiorari and affirm the decision of the Court below without further briefs or argument.

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